92-586

Supreme Court, U.S.
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No. 92-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THE FUND FOR ACCURATE AND INFORMED REPRESENTATION, INC., (FAIR) *et al.*

Appellants

v.

SAUL WEPRIN, *et al.*

Appellees

Appeal from the United States District Court for the Northern District of New York

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does an overall range of population deviation of less than ten percent preclude any argument that a State legislative redistricting plan violates the one-person, one-vote principle?

2. Is a claim of unconstitutional partisan gerrymandering of a State Assembly barred by the fact that plaintiff's voting rights for other state and legislative offices are not similarly affected?

3. Did the District Court err in holding that a redistricting plan which grossly fragments communities of interest and political subdivisions in a manner neither required by nor supporting any rational state interest was not a violation of the Equal Protection Clause?

THE PARTIES

Appellants here, plaintiffs in the F.A.I.R. action below, are as follows: THE FUND FOR ACCURATE AND INFORMED REPRESENTATION, INC., JUAN DE SANCTIS, AUGUSTINE C. CHEN, ONEL ALFRARO, MARGARET QUIGLEY, HELEN K. HORN, CALVIN L. WALTON, JUAN L. JIMENEZ, FELIX FIGUEROA, ALFRED HONG, EMORY N. JACKSON, JUAN DE LA CRUZ, BROOKLYN POLITICAL ACTION COMMITTEE, INC., MARTIN CHICON, RONALD TRAVIS, MARTHA HOWLETTE, LOUIS DEGUZMAN, MARION PHILLIPS, BAY RIDGE COMMUNITY COUNCIL, INC., TOWN OF CATSKILL, GREENE COUNTY, BUFFALO COMMON COUNCIL, AND GEORGE K. ARTHUR.

Appellees here, defendants in the F.A.I.R. action below, are as follows: SAUL WEPRIN, both Individually and as Speaker of the Assembly of the State of New York, DAVID GANTT, both Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment, DEAN SKELOS, both Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment, MARIO CUOMO, both Individually and as Governor of the State of New York, STANLEY LUNDINE, both Individually and as Lt. Governor of the State of New York and as Presiding Officer and President of the Senate of the State of New York, THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, THE SENATE OF THE STATE OF NEW YORK, THE ASSEMBLY OF THE STATE OF NEW YORK, and THE BOARD OF ELECTIONS OF NEW YORK STATE.

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Appeal from the United States District Court for the Northern District of New York

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JURISDICTIONAL STATEMENT

In this state legislative redistricting case, appellants submit this statement disclosing the reasons for their appeal from the final judgment and *per curiam* opinion of a three-judge court for the United States District Court for the Northern District of New York. Appellants alleged several violations of federal constitutional rights, including population inequality, racial gerrymandering and partisan gerrymandering. The District Court, following an abbreviated summary trial, found no violation in the new districting plan for the New York State Assembly.

OPINIONS BELOW

Several memorandum opinions and orders are included in the Appendix accompanying this Statement. The post-trial opinion of the three-judge panel is dated July 2, 1992. This opinion was subsequently amended August 19, 1992. There was a multiplicity of parties and actions with respect to the validity of the legislative redistricting plan. Several of these were consolidated in the federal court action. The only difference between the original July 2, 1992 opinion and the amended version of August 19, 1992 relates to the "Background" section in which the three-judge court reviews the tortuous path taken by this litigation. Only the amended version is included. *See Appendix A.*

In addition several earlier opinions which addressed preliminary motions, amendment of the plaintiffs' complaint, and the validity of the 1983 plan, are included for reference. *See Appendixes B-G.*

JURISDICTION

Appellant's complaint below sought injunctive relief against the enforcement of a New York Assembly redistricting statute pursuant to 28 U.S.C. §§1331, 1341 and 2284; 42 U.S.C. §1973j(f); and 42 U.S.C. §1983. Declaratory relief was sought pursuant to 28 U.S.C. §§2201 and 2202. The three-judge court was convened pursuant to 28 U.S.C. §2284. The order and judgment of the three-judge District Court was filed July 9, 1992. It dismissed the Appellant's complaint with prejudice and denied Appellant any relief. A timely notice of appeal was filed on August 6, 1992. Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises under:
(a) Section I of the Fourteenth Amendment of the Constitution of the United States which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.;

(b) the First Amendment to the Constitution of the United States which provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.; and,

(c) Chapters 76, 77, and 78 of the Laws of 1992 for New York State, the portion of which pertains to the redistricting of the New York Assembly being appended to this Statement in the Appendix. *See Appendix I.*

STATEMENT OF THE CASE

During 1990 the U.S. Bureau of the Census conducted a census of the United States, including the State of New York, pursuant to the Constitution of the United States, Article I, Section 2. The results of this Census showed that there had been a significant shift in population among New York State Assembly Districts since the 1980 Census. Based upon the 1990 Census enumerating the population of New York, it was the duty of the New York Legislature under the United States Constitution, the Fourteenth and Fifteenth Amendments thereto, to enact a new district plan for the members of the New York Assembly.

The New York Legislature spent the major portion of the prior decade preparing for this process. It created the New York State Legislative Task Force on Demographic Research and Reapportionment ("Task Force"), controlled by the partisan majority of each chamber, to perform the drafting of redistricting plans for the consideration of the Legislature. A vast amount of election and other political data was amassed, sophisticated equipment and software purchased and professional staff retained. An Assembly plan was drafted by the Task Force with the intent to invidiously discriminate against an identifiable group, Republicans.

The original complaint was filed March 3, 1992, challenging the timing and redistricting proposal of the Task Force. A revised redistricting proposal was released by the Task Force on March 5, 1992. A plan which substantially embodied the Task Force's March 5 proposal was enacted by the Legislature on March 9, 1992. Following several so-called "Chapter amendments", Governor Cuomo signed the bill on May 4, 1992.

Following the signature by the Governor, an amended complaint was filed which differed from the original complaint insofar as it, the amended complaint,

addressed not the Task Force proposal but the Assembly Plan as Adopted by the Legislature.

A three-judge District Court was convened pursuant to 28 U.S.C. §2284. In a May 20 order, *see Appendix G,* Judge Cholakis dismissed Appellant's claim that a district plan, which grossly fragments communities of interest and political subdivisions in a manner neither required by nor supporting any rational state interest, was a violation of the Equal Protection Clause. This decision was affirmed by the full three-judge panel in a Memorandum and Order dated May 28, 1992. *See Appendix E.*

The Appellants filed a final amended complaint on June 1, 1992 requesting that the court enjoin the administration of the Assembly elections based upon the new plan and to declare the plan to be in violation of the First, Fourteenth, and Fifteenth Amendments to the United States Constitution, the Federal Civil Rights Act, and the Federal Voting Rights Act.

A complete alternative Assembly plan for the entire Assembly was provided to the District Court by Appellants/Plaintiffs to demonstrate the numerous flaws of the Assembly Plan as Adopted, and to provide a ready remedial device. The Appellants' plan ("FAIR Plan") contained a lower overall range of population deviation, was more compact, provided additional representation for racial and ethnic minorities, and was bereft of any partisan gerrymandering techniques.

A two-day summary trial was held in Utica, New York on June 24, 25, 1992. This appeal follows the decision of the three-judge District Court's Memo-randum and Order of July 2, 1992, as amended on August 19,1992, dismissing the Appellants' complaint with prejudice. *See Appendix A.*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. Does an Overall Range of Population Deviation of less than Ten Percent Preclude any Argument that a State Legislative Redistricting Plan Violates the One-Person, One-Vote Principle?

A. The District Court Misconstrued this Court's Many Decisions in the Area of One-Person, One-Vote.

The District Court ruled that since the overall deviation from strict population equality was under 10%, no further inquiry was necessary and a Fourteenth Amendment claim could not be sustained. Such an unsophisticated reading of this Court's many decisions in this subject area is a distortion of this Court's appreciation of a basic principle of representative democracy, that of one-person, one-vote.

Since the 1960s this Court has consistently promulgated that the goal of any districting plan is "fair and effective representation". A tenet of fair representation is that each district be "substantially equal in population". This Court has also recognized that "mathematical exactness" may be balanced against rational state interests in the drafting of districting plans for state legislatures.

B. The Goal of Any Districting Plan is Substantial Equality of Population.

In *Reynolds v. Sims,* 377 U.S. 533 (1964), this Court held that the Equal Protection Clause required that those responsible for crafting legislative districting plans "make an honest and good faith effort to construct districts...as nearly of equal population as is practicable". *Id.* at 568. This Court recognized the then limits of the line-drawing

process by stating that "it was a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters". *Id.* at 577.

While the practicability of absolute equality was a limiting factor thirty years ago, given today's technology there is no limitation on full implementation of the *Reynolds* mandate of equal population. As Justice Stevens noted in *Karcher v. Daggett*, 462 U.S. 725 (1983), "Computers now make it possible to generate a large number of alternative plans, consistent with equal population guidelines...and to analyze the political characteristics of each one in considerable detail." *Id.* at 752, n.10. In the 1990s a personal computer can quickly create district plans of absolutely equal numbers.

That the equal population goal could be manipulated as just another tool for gerrymandering was also recognized by this Court in *Reynolds*, far before the computer revolution which facilitated hundreds of districting plans to be analyzed by Appellees. "Indiscriminate districting, without any regard for political subdivisions or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Id.* 377 U.S. at 578.

C. Every Deviation from Population Equality Must Advance a Rational State Interest, Be Consistently Applied, and Be Free of Taint from Discrimination.

Over the past three decades, rules of judicial economy have evolved to minimize the intrusion of the Courts into this inherently political process. The most recent statement by the Court on this is *Brown v. Thomson,* 462 U.S. 842 (1983). In consideration of the balancing test between strict population equality and the legitimate interests of the States, this Court resolved that certain "minor deviations from mathematical equality...are

insufficient to make out a *prima facie* case...so as to require justification by the State." *Id.* at 842, quoting from *Gaffney v. Cummings,* 412 U.S. 735 (1973).

The Court prefaced this statement by a discussion of some legitimate state interests, e.g., political subdivisions, compactness, contiguity. The Court then stated, *as a general matter,* that an overall deviation under 10% was minor in nature. Brown at 842, (emphasis added). However, Justice Powell still observed that "The ultimate inquiry, therefore, is whether a legislature's plan 'may reasonably be said to advance [a] rational state policy...' ". *Id.* at 843.

Since the Court stated the 10% figure as a *general* matter, the underlying rationale of *Reynolds* and its progeny must be considered as the touchstone for invocation of this 10% threshold exemption. The *Reynolds* Court addressed this in 1964: "Careful judicial scrutiny must of course be given... to the character as well as the degree of deviations from a strict population basis." 377 U.S. at 581. "If population is submerged as the controlling consideration...then the right of all the State's citizens... would be constitutionally impaired."

In *Roman v. Sincock,* 377 U.S. 695 (1964) this Court also refined this exemption for the line-drawers. "The Constitution permits such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Id.* at 710.

A few years later this Court again relied upon Reynolds to describe the type of deviations which could be classified as minor. In *Swann v. Adams,* 385 U.S. 443 (1967), this Court "limited the allowable deviations to this minor variations which 'are based on legitimate considerations incident to the effectuation of a rational state policy.'" *Id.* at 444, quoting *Reynolds.*

Several cases have reviewed the justification requirement for deviations from strict population equality. In *Gaffney v. Cummings, supra.* and *White v. Regester*, 412 U.S. 755 (1973), this Court, while addressing minor deviations in population, restated that this minor deviation exemption is not the end of the inquiry available to the courts. "State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment." *Gaffney*, 412 U.S. at 751, citing several pre-*Bandemer* political discrimination cases.

See also, *Licht v. Quattrochi*, 449 A.2d 887 (R.I., 1982), 5% overall deviation invalidated; *Licht v. Quattrochi*, CA No.82-1494 (R.I.Super.Ct,1982), 1% deviation appeared to be the limit to the Court; *Farnum v. Burns*, 561 F.Supp. 83 (D.R.I.,1983), 5.6% deviation invalidated; *White v. Crowell*, 434 F.Supp. 1119 (W.D., Tenn, 1977), political considerations insufficient to justify deviation over 5%.

If the Appellants' argument that the population disparities present in the State's plan violated the Equal Protection Clause rested solely on the overall range of deviation, the Appellants would not have presented the District Court with a *prima facie* case. In addition to the presentation of the range of population deviation, the Appellants proved to the Court, without dispute, that an Assembly district plan could be created with significantly lower population deviations. *See Plaintiffs Exhibits 55, 75, 76; Response to Questions of the Special Master.*[1] The deviations present in the State's Assembly Plan were not

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[1] Not only did the overall range of population deviation increase significantly over the range from the 1980s, the distribution of deviations changed as well. Following the 1980 Census 61% of the Assembly districts were within a range of -1.0% to +1.0%, following the 1990 Census only 28% of the districts were within this range. Likewise, the mean relative deviation increased almost 100% between the two plans.

the result of any effort to advance a rational state policy. These additional factors are sufficient for the presentation of a *prima facie* one-person, one-vote claim.

D. When, As Here, An Illegitimate Purpose is Admitted, Every Deviation from Population Equality Must be Justified, Irrespective that the Overall Range of Deviations is Under the Ten Percent Threshold.

The Appellees admitted that it was the State's intent to invidiously discriminate against an identifiable political group throughout the redistricting process. *See Stipulation of the Parties, June 22, 1992.*

In fact, this is exactly what the Appellees did in this case. The consideration of partisan control of the State Assembly was paramount to every other factor in the very complex redistricting process. This admission by the Appellees was further evidenced by several facts surrounding the plan and the entire process by which the State finally produced a districting plan.[2]

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[2] a) the State spent over $18 million dollars over the decade of the 1980s to prepare for the redistricting process, this included a vast database of election results correlated to census information; b) the very sophisticated computer system used by the Assembly Majority was easily capable of significantly smaller population deviations; c) the overall range of population deviations following the 1980 Census was 8.14%, lower than that of the 1990 Assembly Plan as Adopted, 9.43%; d) so-called neutral criteria, e.g., preservation of political subdivisions, were inconsistently applied; e) available alternatives with smaller overall deviations were possible, e.g., a range of 3.91% for Appellants FAIR Plan; and f) a discriminatory impact on political groups as a result of the inconsistent application above, the most over-populated and *under*-represented districts being areas favorable to the Assembly Minority while the most under-populated and *over*-represented areas being those most favorable to the Assembly Majority.

Appellants do not contend that a claim can be based merely upon the availability of plans with lower overall deviations. Rather, it is the contention of Appellants that when, as here, there are *multiple* indications that actions of the State were not free from taint of discrimination, that an illegitimate interest was paramount to strict population equality, and state policies were not consistently applied, then the burden should shift to the State to justify all deviations.

E. Indiscriminate Implementation of the Ten Percent Threshold Exemption Shifts the Goal Away from Population Equality.

The perception among some that the *Brown* opinion enunciated a 10% threshold exemption has resulted, in New York, in just what the *Reynolds* court had tried to avoid. The *Brown* threshold exemption has been viewed as an open invitation to include population deviations as another technique of partisan gerrymandering by today's computer assisted political cartographers. It certainly is possible, given today's technology, to produce districts, even state legislative districts, with a minimal deviation from strict population equality. See, for example, the case of Illinois following the 1990 U.S. Census.[3]

On the other extreme, there is the case of the New York Assembly, the instant case, where despite the

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[3] Illinois, with a 1990 U.S. Census population of 11,430,602, created a 118 district plan with a total range of deviation of 0.0000%, resulting in 60 districts with a deviation of 0 persons and 58 with a deviation of -1 person. There is little doubt that the deviation would have been 0 persons in all 118 districts had the state total population been evenly divisible by 118.

national trend and the increasingly more refined technology, the Appellees created a plan with an overall deviation *significantly larger* than currently exists, and *significantly larger* than alternative plans. If the District Court's interpretation of this Court's decision in *Brown* is left to stand, there will be no incentive for the line-drawers to have strict population equality (0%) as their goal. Those familiar with the subject will know that 10% is what will pass legal muster. If all deviations under 10% are left to stand without explanation, no matter what rationales are enunciated, or used, by the State, the goal will no longer be 0% with latitude for a state's legitimate interests[4]. The new goal will be 10.000% and population equality will be subordinated to other illegitimate concerns, most notably the partisan gerrymander.

The Appellees have admitted their intentional partisan discrimination and this consideration was paramount to any others in this case. Allowing the use of this significant gerrymandering tool to stand without any justification will lead to a complete subversion the *Reynolds* standard of strict population equality. *Reynolds* recognized two reasons for not requiring strict equality. The first, of practicability, was primarily a technological limitation, now since removed. The second, that of the balancing test against state interests, is still a valid inquiry. However, one can not assess this inquiry if the opinion of the District Court is allowed to stand.

The District Court, in this case, should have required the State to justify all deviations from strict population equality. Given the paramount importance of the State's admitted partisan discrimination, an illegitimate state interest, the deviations would not have been supportable and the plan should have been ruled invalid as being violative of the Fourteenth Amendment.

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[4] The Co-Chairmen's report of the Majority Task Force which created the plan classified their actions as in "strict adherence" with one-person, one-vote.

II. Is A Claim of Unconstitutional Partisan Gerrymandering of a State Assembly Plan Barred Because Appellants' Voting Rights for Other State Offices Are Not Similarly Affected?

The present New York Assembly plan was intended to discriminate and efficiently does discriminate against Republicans on a statewide basis and Republican voters in particular districts. This discrimination is accomplished through manipulation of Assembly district lines. The Assembly plan is a gross partisan gerry-mander.

A. A Districting Plan that Intentionally Discriminates Against an Identifiable Political Group and Has a Significant Discriminatory Effect Violates the Equal Protection Clause

In *Davis v. Bandemer*, 478 U.S. 109 (1986), this Court recognized that political gerrymandering cases were justiciable under the Equal Protection Clause of the 14th Amendment.[5] To succeed on such a claim, appellants must prove both intentional discrimination and an actual discriminatory effect. *Id.* at 127. The Assembly Majority Appellees stipulated to the District Court that they "intentionally discriminated against an identifiable political group" when drafting the Assembly District Plan.

The New York Assembly plan is extremely effective in fulfilling the intention of its authors, discrimination against Republicans. The District Court concluded that the admitted intent to discriminate and the discriminatory effect of the Assembly plan were immaterial because Republicans are elected statewide and are a majority in the State Senate. "The fatal flaw in plaintiffs' case is the

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[5] See M. Hess, *Beyond Justiciability Political Gerrymandering after Davis v. Bandemer*, 9 Campbell L. Rev. 207-54 (Spring 1987).

simple fact that the New York State Senate is an integral component of the state's legislature, and that Republicans hold a majority of the senate seats....These undeniable facts are critical when a political party claiming to be gerrymandered out of the state's political process must show that it has been shut-out of the process 'as a whole'. *Bandemer*, 478 U.S. at 132." District Court July 2, 1992 Opinion p. 9. *See Appendix A, p. 15a.*

The District Court holds that Appellants' voting rights can never be violated by a districting plan that intentionally and egregiously discriminated against the Appellants if any of the "whole" election process is fair and open to them. The political success of the Republicans in non-gerrymandered statewide elections and in the State Senate is an indicia of the harshness of the 1982 gerrymander of the New York Assembly districts rather than an excuse for a repeat gerrymander in the 1990s. The Appellees' argument that a group's political success at one level of government bars that group from successfully proving dilution and discrimination at other levels of government defies both common sense and this Court's jurisprudence. Taken to its logical conclusion, this reasoning would suggest that once a group achieved some degree of political success, constitutional protections for that group evaporate. The political success of Mayor Dinkins in New York City does not mean that the Equal Protection Clause no longer protects Black voters from racial gerrymandering in New York congressional districts.

The plaintiffs before the District Court were not the Republican members of the State Senate nor Republican Assembly members. The constitutional rights sought to be protected were those of Republican voters. Individual members of the legislature do not have the right to bargain away the constitutional and voting rights of Republican voters. This action is not to protect the rights of any legislative members, but the rights of New York voters.

This gross partisan gerrymander violates democratic values by conceding to the legislature the power of self-selection.[6] The very idea of American democracy should forbid a legislature from insulating itself from popular will.[7] Justice Clark, concurring in *Baker v. Carr*, 369 U.S. 186 (1962), wrote that he would "not consider intervention by this court in so delicate a field if there were any other timely and effective relief available to the people of Tennessee" by which they could effect the reapportionment of their legislature. 369 U.S. at 259. This Court should not intervene if there was other relief available to the people of New York. There is none. Without this Court's intervention, the partisan complexion of the New York Assembly will be locked in place until the next century.[8]

The fact that the Republican members of the Senate made a 'Faustian' deal to preserve their majority at the expense of the rights of individual Republican voters should not preclude this Court from granting relief.

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[6] The New York Assembly has the second lowest membership turnover of any legislative chamber nationwide following only Arkansas.

[7] See also Sturn, *Political Gerrymandering, a Statutory Compactness Standard as an Anecdote for Judicial Impotence*, 41 U. Chi. L. Rev., 398-405 (1974). Gerrymandering "diminishes effective representation by decreasing the number of politically competitive districts . . . the controlling party is not forced to select its best candidate . . . incumbents may be able to continue in office without accounting to the voters in any significant way . . . gerrymandered districts eliminate the need to fuse very small or single issue groups into an electoral coalition . . . ."

[8] Just as the New York Assembly partisan gerrymander following the 1980 census has allowed the current incumbents to further eliminate competition.

B. The Discriminatory Effect of the New York Assembly Plan on Appellants' Voting Rights Far Exceeds the Discriminatory Effect of the Plan in Bandemer

In *Bandemer*, the Indiana Democratic party Appellants failed to show that the Indiana House plan was an effective continuing gerrymander. They failed to show an actual significant discriminatory effect. The Indiana evidentiary presentation relied on the result of a single election to support a claim. "Relying on a single election to prove unconstitutional discrimination is unsatisfactory" *Id.* at 135.

In New York, these Appellants provided the District Court with compelling evidence that the newly enacted Assembly redistricting plan consigns the Republicans to a minority status in the Assembly throughout the 1990s and into the next century. The Appellants' evidence did not rely on a single election to prove discrimination or partisan unfairness. *Unlike Bandemer*, Appellant did present an analysis based upon projected New York election results for district boundaries and past voting patterns, exactly the evidence this Court stated would support such a claim. *Id.* at 139 n.17. *Unlike Bandemer*, if New York Republican candidates win a few additional percentage points of the votes cast statewide, the Democrats will still retain a majority of seats in the Assembly. *Id.* at 135. *Unlike Bandemer*, there is no reasonable likelihood that the Republicans can in one of the next elections secure sufficient votes to take control of the Assembly. *Unlike Bandemer*, the Appellants here are not arguing about a mere lack of proportionate results in a single election. *Unlike Bandemer*, these are not transitory results. *Id.* at 140.

The reason for the Indiana Appellants' evidentiary failure is now easily understandable, the alleged gerrymander was not effective. The Democrats shortly

took control of the Indiana House. The Republican leaders of the Indiana House failed to create an effective, continuing gerrymander so a sufficient discriminatory effect was not present to support a constitutional claim. The Democratic leaders of the New York Assembly have not failed in their carefully planned and lavishly financed effort to discriminate against the Appellants.

The Appellants' have analyzed New York election data for many political offices from 1968 to 1990 and corresponding census data. They have analyzed th[illegible] information and other variables from 1984 to 1990 a[illegible]d have aggregated this data for the newly enacted districts. Their methods and programs are now being used by scholars and practitioners of both major parties in at least half the states. [9] This system was used to evaluate past elections and make election projections under the newly enacted plan.[10] The conclusion is clear, the Democratic

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[9] Browning, Robert X., and Gary King (1987). *Seats, Votes, and Gerrymandering: Estimating Representation and Bias in State Legislative Redistricting,* Law and Policy Vol. 9, No. 3 (July); Pp. 305-322. Gelman, Andrew, and Gary King (1990). *Estimating the Electoral Consequences of Legislative Redistricting,* Journal of the American Statistical Association, Vol. 85, No. 410 (June); Pp. 274-282. King, Gary (1989). *Representation Through Legislative Redistricting: A Stochastic Model,* American Journal of Political Science, Vol. 33, No. 4 (November); Pp. 787-824. See also, Gelman, Andrew and King, Gary, *Judge-It, A unified Method of Evaluating Electoral Systems and Redistricting Plans,* Center for American Political Studies, Harvard University, Occasional paper 92-5, 1992, includes computer software which was the recipient of the Research Software award for 1992 from the American Political Science Association.

[10] The high level of accuracy of Appellants' expert Dr. King's prediction methodology is remarkable. For the election years 1986, 1988 and 1990, this method correctly projects election results in 438 out of 450 Assembly elections (97.3%).

Assembly leaders created a very effective and continuing gerrymander.

The New York Assembly electoral system is fundamentally unfair. This evaluation of the fairness of an electoral system is based on two concepts: partisan bias and electoral responsiveness.

Partisan bias measures the level of partisan discrimination present in a plan. Partisan bias is a more sophisticated standard than proportional representation or a simple seats versus votes analysis. The basic tenet is that a fair electoral system is one which treats the parties equally. For example, if the Democrats receive 55% of the vote and are able to translate this into approximately 65% of the seats in the Assembly, the process would be "fair" only if the Republicans were also able to translate 55% of the votes into 65% of the seats in the Assembly. A biased electoral system is one in which one party would consistently control a significantly larger proportion of seats for a given proportion of votes than was possible for the other party. This is the New York Assembly pattern. It is an electoral system that is heavily biased against Republicans and substantially discriminates against voters who vote for candidates of that party and their opportunity to influence the political process effectively.

Electoral responsiveness is the degree to which the allocation of seats among political parties in a legislature responds to changes in voter preference. This applies to all voters, not only those of one political party. If incumbents of both parties always receive huge majorities, then even very large statewide swings in voter preferences have little or no effect in changing district election outcomes. The New York Assembly is characterized by extremely low responsiveness which produces a continued frustration of the will of a majority of the voters and grants them no fair chance to influence the political process.

The electoral system in the New York State Assembly has been characterized by substantial political gerrymandering for many years. Throughout the 1980s, partisan bias egregiously discriminated against the Republicans. The plan at issue before this court increases this already large bias for the 1990s. Bias or discrimination is of a higher degree than found by Appellant's experts in any other state plan. Bias is not self-correcting. This high degree of partisan bias or partisan discrimination will remain at about this level or higher until at least the next redistricting in the next century. The District Court's opinion does not dispute these facts.

The Assembly plan is replete with various indicia of gerrymandering--dramatically irregular shapes, a lack of compactness, different treatment of incumbents, ignoring political boundaries for partisan purposes, population disparities for partisan purposes and a severe disproportionality of seats/votes. An examination of the plan by Appellant's expert Dr. Gordon Baker, using a variety of different techniques,[11] leads to the obvious and inevitable conclusion that it is a gross partisan gerrymander which will continue to significantly degrade the electoral power of Republican voters into the next century. The District Court's opinion does not dispute this conclusion.

Gerrymandering is the "pathology of democracy."[12] Many public interest groups and numerous scholars have concluded that gerrymandering (a) unfairly discriminates against minority interests, (b) unduly rewards incumbency,

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[11] Baker, Gordon, 3 J. L. & Pol. 1-19 (Winter 1986). See also Baker, Gordon, *The Totality of Circumstances*, Political Gerrymandering and the Courts 212-239 (B. Grofman, Agathon Press 1990).

[12] Shapiro, Martin, *Gerrymandering Fairness in the Supreme Court*, 33 UCLA L. Rev. 227, 239 (1985).

(c) reduces political competition and thereby undercuts the quality and responsiveness of legislators; and (d) discourages voter participation by preordaining election results.[13] By virtue of the partisan gerrymander following the 1980 census, these same incumbents (nearly one half of whom were in the Assembly for the last redistricting cycle) can further exacerbate the diminishing of democratic ideals by their selfish perpetuation of political hegemony.

If a legislative plan looks like a partisan gerrymander, has the effect of a partisan gerrymander, and its drafters intended it to be a partisan gerrymander, then surely the plan is a partisan gerrymander. If the level of partisan bias or discrimination present in this plan is not enough to support a successful Equal Protection claim, such a claim will never be successful. The promise of the *Bandemer* decision that judicial relief would be available to the victims of gross partisan gerrymandering is then simply an illusion.[14]

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[13]ABA Special Committee on Election Law and Voter Participation, *Congressional Redistricting 3* (1981). The American Bar Association has been joined in its call for reform by the American Civil Liberties Union ("ACLU"), Common Cause, League of Women Voters, the National Association for the Advancement of Colored People ("NAACP"), the National Municipal League and the Mexican American Legal Defense Fund ("MALDEF"), among others.

[14]The Appellees will argue that the Assembly plan cannot be a partisan gerrymander because some Republican Assembly members voted for the plan. Specific members of the Republican Assembly caucus voted for the plan in response to the majority's cynical strategy of pairing numerous Republican members in its initially proposed plan and using the promise of unpairing to lure them to vote for the plan. The votes were needed because of the Governor's threat to veto the redistricting bill.

Republican legislative members voting for a Democratic gerrymander is not as illogical as might seem at first impression.

C. The First Amendment Protects Political Parties and Their Supporters from Egregious Political Gerrymandering

Partisan gerrymandering seriously restricts First Amendment rights by placing burdens on the freedoms of expression and association. In *Elrod v. Burns*, 427 U.S. 347 (1976), this court said that "patronage can result in the entrenchment of one or a few parties to the exclusion of others. And most indisputably . . . , patronage is a very effective impediment to the association and speech freedoms which are essential to a meaningful system of democratic government." *Id.* at 369. The New York Assembly gerrymander has resulted in the entrenchment of the Democratic party to the exclusion of others in the Assembly. This court rejected patronage position dismissals in *Elrod* because they impinged upon the First Amendment associational rights, even though partisan patronage was a longstanding and widespread practice throughout the country, and plausible legitimate state interests could be articulated which supported the practice.[15]

The impediment to associational and speech freedoms imposed by a gross partisan gerrymander are not supported by any plausible legitimate state interests. No theory of democratic representation supports or is advanced by partisan gerrymandering. Unlike the chilling

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Republican members of the legislature have the perverse incentive to do nothing about the current gerrymander because they typically reside in packed districts. They are the beneficiaries of those carefully constructed super-majorities which form half of the gerrymander equation. It is not surprising that they would think twice about a suggestion that they accept a smaller margin of victory for the good of the party.

[15] See Justice Powell's dissent *Elrod v. Burns*, 427 U.S. 347, 376 (1976). Justice Scalia's dissent *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2746 (1990).

of First Amendment associational rights linked to political patronage, which have grown less significant in many states through civil service reforms, gerrymander techniques grow more powerful with new technology.

The Assembly majority has manipulated district lines to such a degree as to provide one party a virtual monopoly in the marketplace of ideas in most Assembly elections. In *Williams v. Rhodes,* 393 U.S. 23 (1968), the Supreme Court held that Ohio's ballot access laws were repugnant to the First Amendment because the electoral process gave a decided advantage to some political parties over others. The state laws burdened "two different, although overlapping, kinds of rights--the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id.* at 30. The complete, partisan monopoly in Ohio offended the First Amendment by placing unequal burdens on both the right to vote and the right to associate.

Partisan gerrymandering is even more starkly offensive to the First Amendment because district lines are drawn specifically to negate the effect of the votes of members of certain parties. Although there is no right to the most effective speech possible, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 (1973), the right to cast effective votes ranks "among our most precious freedoms," *Rhodes*, 393 U.S. at 30. When voters are identified on the basis of party affiliation and are relegated to a district specifically designed to eliminate their ability to affect the outcome of an election, the denial is not one of the "most effective" speech, but an elimination of the constitutional right to participate in the electoral process.

In *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983), the Court found unconstitutional Ohio's early campaign filing deadline because it threatened "to reduce diversity and competition in the marketplace of ideas." The

deadline discriminated against voters with a particular political orientation and thereby contravened the associational freedoms of the First Amendment. As the Court noted, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference . . . ." *Id.* at 793 (footnote omitted). However, it is precisely for the purpose of imposing such restrictions on political parties that New York's gerrymandered Assembly lines are drawn.

Gerrymandering infringes on First Amendment associational rights because it dilutes the impact of voters with a particular partisan association or view. It is a fundamental tenet of American democracy that a representative government must be responsive to the changing will of the electorate. A redistricting that is largely insensitive to electoral changes because it locks in a lopsided partisan imbalance through the use of dispersion and concentration techniques of gerrymandering thwarts the very purpose of political association.

Partisan gerrymanders "are designed to limit the effectiveness of organized political activity, and for that reason strike at the rights of free speech and free association guaranteed by the First Amendment." Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket*, 1 J.L. & Pol. 357, 373 (1984). By impairing the ability of the voters to change their representatives on election day, the gerrymander "limits use of the political processes that the First Amendment is intended to protect." *Id.*

Where, as here, an act affects fundamental rights of speech and association, it is subject to the "closest scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61, (1958)); accord, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978); *Federal Election Commission v. National*

Conservative Political Action Committee, 470 U.S. 480 (1985). Political parties and their adherents "enjoy constitutionally protected rights of political association," *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975).

Wherever limitations are placed upon First Amendment rights, particularly those involving speech and political association, the state may prevail only upon a convincing demonstration of a compelling govern-mental interest. *NAACP v. Button*, 371 U.S. 415, 438-39 (1963). Furthermore, "the burden is on the government to show the existence of such an interest." *Elrod, supra*, 427 U.S. at 362. The protection of a party's majority in a legislative chamber is not a compelling state interest. Even the New York Assembly majority does not explicitly advocate this position. In the absence of a compelling state interest, the impairment of First Amendment rights should be struck down.

A gerrymander aims to destroy the competitive nature of our political process which often eliminates any serious discussion of political issues in Assembly campaigns across New York. Gerrymandering software for computers increases in power and sophistication almost by the month.[16] Unlike past redistricting cycles, census data were available in 1990 for New York by political units. These data, combined with an extensive database of election results and enrollment numbers, permit very sophisticated manipulation of boundaries. Individual voters, simply because of their party affiliation, are assigned to electoral districts where there votes are by design rendered without effect. Naturally, the activities of these individuals in the political process is severely discouraged by grossly gerrymandered districts which makes the advocacy of particular candidates or parties a fruitless civic exercise.

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[16] Anderson and Dahlstrom, *Technology of Gerrymandering*, 22 Urban Lawyer 59, 73-76 (1990).

"Rotten boroughs", the diseased fruit of the partisan gerrymander, cf. *Brown v. Thomson,* 462 U.S. at 856 (Brennan J. Dissenting), citing *Reynolds,* 377 U.S. at 567-68; *Baker v. Carr,* 369 U.S. at 302-07 (1962) (Frankfurter, J., dissenting), simply demand no discussion of issues by their representatives. Many gerrymandered districts go uncontested, or are not seriously contested, so speech is not just diminished, it is eliminated. See Baker, *Representation and Apportion-ment, III Encyclopedia of American Political History* 1118, 1128 (J. Green ed. 1984). Since the electoral process is, through clever computer-assisted cartography, foreordained, the marketplace of ideas is foreclosed to those whose party did not control the redistricting process.

Justice Brennan stated, "to the victor belong only those spoils that may be constitutionally obtained." *Rutan v. Republican Party of Illinois,* 110 S. Ct. 2729, 2731 (1990). A permanent majority in a chamber of the New York Legislature should not be 'spoils' which may be constitutionally obtained. The District Court's opinion fails to even acknowledge the argument that the gerrymander process impairs political associational rights.

III. Did the District Court Err in Holding that a Redistricting Plan Which Grossly Fragments Communities of Interest and Political Subdivisions in a Manner Neither Required by nor Supporting any Rational State Interest was Not a Violation of the Equal Protection Clause?

The State of New York may not create Assembly districts which have no rational or legitimate justification. In *Reynolds,* Justice Earl Warren, writing for the Court, describing a legislative plan, said, "[T]he existing apportionment . . . presents little more than *crazy quilts,* completely lacking in rationality, and could be found invalid on that basis alone." Reynolds at 568 (emphasis added).

The existing New York Assembly apportionment presents little more than a crazy quilt, completely lacking in rationality, and should be found invalid on that basis alone.

The District Court dismissed this claim based upon a misinterpretation of the Appellants' allegations and proposed arguments. The Appellants did not seek a ruling that cultural communities or political subdivisions such as towns or other incorporated communities are entitled to protection from being divided or made part of another district. Memorandum-Decision, May 20, 1992. *See Appendix G.* Appellants do not argue that any particular neighborhood, city, town, geographic, or interest community is entitled to be grouped together as a single election unit. Appellants argue that the individual right of voters and citizens in these communities are debased by their needless fragmentation and division between Assembly districts. There is no legal or rational state interest supporting these divisions. If there is any legitimate or rational state policy which justifies the bizarre, crazy-quilt fracturing of various geographic, ethnic and political communities in the Assembly plan, this particular argument would fail. Appellants assert that no such legitimate rationale exists.

A member of the Assembly cannot easily represent his constituents, nor can voters for a district exercise the franchise intelligently when an Assembly District is nothing more than a fragmented unit divorced from, and indeed possibly in conflict with, the various other political communities established by the State. Members of the legislature are less likely to be visible and identifiable to their constituents if legislative boundaries are completely independent of other traditional geographic or political boundaries.

New York Assembly boundaries are unknown to all but the most devoted political activists. A simple inability of the elector to understand who their elective

representative is or what citizens their Assembly member represent can contribute to increasing voter apathy. Assembly Districts should present manageable and understandable constituencies for legislators to seek electoral support and to represent.

It is unquestionable that legislators are elected to represent people and not trees or acres, but people participate in our political process through group action. Legislators represent not only individuals, but also the organized and unorganized interests of groups of people. If members of the legislature become uncoupled from specific political subdivisions or rationally recognized communities of interest, and their bonds to identifiable interests are lessened. Legislative members cast free of the responsibility for specific communities of interest become more vulnerable to the influence of special, or single, interest groups.

The legislative redistricting task calls for legislators to be impartial, dispassionate and unbiased when deciding their political future and that of their friends and foes. King Solomons are in short supply, even in the New York Assembly. The computer-assisted redistricting process, without guidance beyond population equality, tempts most state legislators beyond their ability to resist. Incumbency, partisan interest, personal ambition or animosity have replaced traditional communities of interest or political subdivisions as building blocks of the redistricting process in New York.

Where neither a suspect class nor a fundamental right is implicated, a court will review a classification with deference, and with a heavy presumption of constitutionality. Still, a law should be stricken if there is no rational relation between the means chosen by the legislature and a legitimate legislative objective. This standard also has been formulated such that a law will be stricken if the classification is "purely arbitrary." *Lindsey v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

Sometimes a slightly stricter standard has been employed by the courts. One frequently quoted is: "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

In *U.S. Railroad Retirement Board v. Fritz,* 499 U.S. 166 (1980) the Court held that so long as there was a "plausible" legitimate reason for Congress to have created the classification scheme it had, the lowest-level equal protection review was satisfied. Under *Fritz,* it appears that any conceivable purpose, if rationally related to the classification scheme, would satisfy lower-level review, even if it was not the actual purpose of the legislature.

Where only one purpose is conceivable and the means chosen are not rationally-related to that objective, the law should be invalidated. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) (scheme for hearing state employment discrimination charges penalized some claimants for mistakes by State Commission and so was not rationally related to objective of expediting dispute settlement).

Similarly, in *U.S. Department of Agriculture v. Moreno,* 413 U.S. 528 (1973), the Supreme Court held unconstitutional a provision limiting federal food stamps to "Households," which were defined so as to exclude households containing an unrelated person. The distinction between households with an unrelated person and others was not rationally related to the expressed purpose of the act, to satisfy nutritional needs and help the nation's agriculture. *Id.* at 534.

Where the only conceivable state purpose is illegitimate, the court may not even reach the issue of rational relation. In *Metropolitan Life Insurance Co. v.*

Ward, 470 U.S. 869 (1985), this Court held that a desire to promote in-state insurers at the expense of out-of-state insurers was not a legitimate state purpose and thus, the statute did not survive even lowest-level review.

In *Moreno*, the Court also found that the purpose or wish to harm politically unpopular "hippie communes" was not a legitimate state purpose. *Id.* 413 U.S. at 534.

The "mere rationality" standard is highly deferential, but the deference is not absolute. The law challenged should be upheld if the means chosen by the legislature bear a rational relation to conceivable legitimate state purposes. If the classification involves an unpopular trait or affiliation, thereby suggesting bias by the majority, a court may subject the statute to a slightly more probing review. The Assembly's computer generated districts without regard to legitimate state purposes such as compactness or the preservation of communities. The purpose programmed into the state computer was to discriminate against Republicans. That is not a rational nor a legitimate state purpose on which to destroy the traditional geographic or community component of our representational system and to thereby debase the voting rights of individuals citizens.

CONCLUSION

This appeal represents an unusually clear legal situation whereby this Court can both protect the fundamental rights of individual citizens and provide guidance to those responsible for crafting the boundaries for the thousands of state legislative districts in our nation.

This Court has repeatedly stated its appreciation for the basic tenets of "fair and effective representation". The court below has misconstrued the very clear statements made by this Court since *Reynolds v. Sims.* Letting the opinion below stand will only foster a continued erosion of the right of voters in New York State

to collectively have an impact on the legislative process of their Assembly, the chamber designed to be the closest to the people. The hegemony of the incumbents will not abate, the process will not self-correct.

The Court should note probable jurisdiction and reverse the lower court.

Respectfully submitted,

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